IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.294 of 2004
With
Civil Application No.682 of 2006

Smt. Pramila Shivaling Chikode & anr. Appellants
Vs.
Mahaling Baburao Chikode Respondent

Mr.M.S.Lagu for appellants.
Mr.S.M.Oak for respondent.

CORAM: B.H.MARLAPALLE, J.

April 09, 2007.

P.C.

1. Heard Mr. Lagu, the learned counsel for the appellants - original defendants. The present respondent - Mahaling filed Regular Civil Suit No.367 of 1991 for perpetual injunction of the suit property deceased as staircase going downward in the basement though shop City Survey No.8011 and right of way through the said shop to go to the basement. In short the suit was for execution of the easementary rights. The property in CTS Nos.8007 to 8011 belonged to the common ancestor Baburao Santram Chikode and he constructed a building on the entire property named as Chikode building. This building consisted of basement, ground floor and first floor. Baburao divided this property amongst his three sons

viz. Shankarrao, Shivling and Mahaling. Mahaling was given the entire basement whereas five shops on the ground floor had gone to the share of Shivling and Shankarrao was given the entire first floor with right to use the terrace. To go to the basement and to the first floor on the eastern side of this building i.e. adjacent to shop no.1, CTS No.8011, there is a staircase located and, therefore, either to go the staircase or to go to the first floor or to the basement, one has to pass through shop no.1. The partition deed at Exhibit 31 is not at all disputed and the defendants in their Written Statement at Exhibit 16 clearly admitted that the partition deed at Exhibit 31 conferred an easementary right of access to the basement as well as to the first floor. In addition the defendants also admitted the right of the plaintiff as well as Shankarrao to the shop no.1 on the extreme eastern side located on CTS No.8011 from the door affixed in the staircase either leading to the first floor or to the basement and from there to approach the staircase. The trial Court by considering the documentary evidence viz. partition deed at Exhibit 31 and the maps of first floor and ground floor at Exhibits 32 and 33 held that though the easementary rights were created in favour of the

plaintiff, the plaintiff had an alternative of opening a door through the southern side wall and consequently on these premises the suit was dismissed.

2. The plaintiff, therefore, filed Regular Civil Appeal No.475 of 1997 and the said appeal has been allowed by the learned 3rd Addl. District Judge at Sangli vide his judgment and order dated 5/11/2003. While setting aside the judgment and decree passed by the trial Court, the suit filed by the plaintiff came to be decreed and the defendants have been restrained from obstructing the right of passage of the plaintiff upto the staircase leading to the basement through the front door facing north of the suit shop bearing CTS No.8011 either by themselves or through anybody else in any manner.

3. Mr.Lagu, the learned counsel submitted that though the partition deed at Exhibit 31 conferred easementary right to use the staircase and shop no.1 to go to the basement or to the first floor, the plaintiff while going to the basement could use the small door opened to the appurtenant rather than opening the shutter of the staircase in its entirety.

The lower Appellate Court has rightly held that this appurtenant door was opened during the pendency of the suit and by way of a temporary arrangement. The lower Appellate Court held that the Southern wall was not in the ownership of the plaintiff and in fact it had gone to the ownership of Shivling and, therefore, it was not permissible for the plaintiff to open a door in the said wall. The view taken by the trial Court has been set aside on this ground and rightly so. When the partition deed at Exhibit 31 created easementary rights, its implementation has to follow and without any limitations or restrictions. It was not proper for the trial Court to take out an imaginary door and to hold that though the partition deed had granted the easementary rights on the staircase, the access to the basement could be created by opening a door in the Southern wall. The lower Appellate Court, therefore, stepped in and corrected this error made by the trial Court more so when the plaintiff did not have the ownership of the wall on the Southern side. When the plaintiff has the easementary right, it was not permissible for the defendants to put restrictions or suggest alternatives to exercise this right. Plaintiff could not damage any of the walls of the shop which did not

belong to him and, therefore, it was clear that the plaintiff had no alternative access to staircase and basement except through the frontage of the said shop situated on the Northern side and through the shutter fixed at the frontage of the said shop. The lower Appellate Court was, therefore, right in setting aside the judgment and decree of the trial Court and to allow the suit.

4. This Second Appeal, therefore, does not involve any substantial question of law on account of the admitted possession of easementary right as set out in the partition deed at Exhibit 31 and, therefore, it must fail at the threshold. The appeal is dismissed in limine.

5. Civil application does not survive and the same stands disposed. Ad-interim order stands vacated. Oral application for continuation of the stay is hereby rejected.

(B.H.MARL